

## The Open App Markets Act: Reining in a Duopoly

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### INTRODUCTION

In August of 2021 the Open App Markets Act was introduced to the Senate in an attempt to limit Big Tech companies' dominance in the digital marketplace.<sup>1</sup> This bill is one of multiple recent federal efforts to increase competition in mobile computing. Generally, the goal is to promote app<sup>2</sup> store competition and strengthen consumer protections within the app market by implementing clear and fair rules designed to prevent Google and Apple from solely dictating app market terms, impeding necessary competition, and restricting consumers' choices.<sup>3</sup> If passed, the Act has the potential of making a huge impact on consumers' daily lives—mobile app markets constitute a significant portion of the digital economy where consumers downloaded about 13.4 billion apps in 2020 alone, collectively spending almost \$33 billion.<sup>4</sup>

The Open App Markets Act would impose multiple restrictions on how a covered company may operate its app store.<sup>5</sup> For starters, it prohibits requiring developers to use an in-

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<sup>1</sup> Open App Markets Act, H.R. 5017, 117th Cong. (1st Sess. 2021).

<sup>2</sup> “App” is defined as a software application or electronic service that may be run or directed by a user on a computer, mobile device, or any other general purpose computing device. *Id.*

<sup>3</sup> *Blumenthal, Blackburn & Klobuchar Introduce Bipartisan Antitrust Legislation to Promote App Store Competition*, RICHARD BLUMENTHAL (Aug. 11, 2021), <https://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-blackburn-and-klobuchar-introduce-bipartisan-antitrust-legislation-to-promote-app-store-competition>.

<sup>4</sup> *See id.*; *see also Antitrust Applied: Examining Competition in App Stores Before the Subcomm. on Competition Pol’y, Antitrust, & Consumer Rts. of the Senate Judiciary Comm.*, 117th Cong. (2021) (opening statement of Sen. Amy Jean Klobuchar, Chairwoman, Subcomm. on Competition Pol’y, Antitrust, & Consumer Rts.), <https://www.judiciary.senate.gov/meetings/antitrust-applied-examining-competition-in-app-stores> (stating that the global app revenues for 2020 were estimated to be more than \$580 billion, and this number is projected to increase to more than \$900 billion by 2023).

<sup>5</sup> A “covered company” is defined as one with more than 50,000,000 U.S. users. Thus, this bill is mostly going to impact Apple and Google who collectively earned \$133 billion worth of mobile app purchases in 2021—making

app payment system controlled by the covered company as a prerequisite for accessing or distributing in their app store. Currently, app developers are subjected to a 15% charge for purchases through Apple and Google’s app stores up to the first \$1 million in annual revenue, then jumping to 30% for any excess.<sup>6</sup> Next, the bill prohibits requiring pricing and conditions of sale to be equal to or more favorable on its app store when compared to others. Covered companies additionally would no longer be able to take punitive action against a developer who offers “different pricing terms or conditions of sale through another in-app payment system or on another app store.”<sup>7</sup> These restrictions would put an end to Apple and Google penalizing developers who offer better prices in other app stores.<sup>8</sup>

The bill also restricts interference with legitimate business communications between developers and users, prohibits utilization of non-public business information from third-party apps for purposes of competing with that app, and disallows unreasonable preferential ranking of one’s own apps over others.<sup>9</sup> Given the “unreasonable” standard, companies may still give preference to its own apps under certain circumstances, such as clearly designating it as an advertisement.<sup>10</sup> Any iPhone or Android purchased by consumers are preinstalled with either the Apple App store or the Google Play store, which are among the multiple apps that are unable to be deleted from devices. The restrictions will allow consumers to delete any preinstalled apps as

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them the largest competitors in the industry. See Tom Romanoff, *Analyzing the Open App Markets Act*, BIPARTISAN POL’Y CTR. (Feb. 2, 2022), <https://bipartisanpolicy.org/explainer/analyzing-the-open-app-markets-act/>.

<sup>6</sup> Kris Holt, *Senate Bill Targeting Apple and Google In-App Payments Moves Forward*, ENGADGET (Feb. 3, 2022), <https://www.engadget.com/open-app-markets-act-senate-committee-apple-google-app-stores-play-store-185302569.html>.

<sup>7</sup> Cong. Rsch. Serv., *Summary: S.2710—117th Congress (2021-2022)*, CONGRESS, <https://www.congress.gov/bill/117th-congress/senate-bill/2710?r=49&s=1> (last visited Mar. 19, 2022).

<sup>8</sup> See Adi Robertson, *Everything You Need to Know About the Bill that Could Blow Up the App Store*, THE VERGE (Feb. 9, 2022, 8:02 AM), <https://www.theverge.com/22914479/open-app-markets-act-legislation-senate-committee-markup-explained> (explaining the potential implications of the Act).

<sup>9</sup> Cong. Rsch. Serv., *supra* note 7.

<sup>10</sup> See Romanoff, *supra* note 5 (“The bill also prevents ‘unreasonable preference’ in-app store rankings – for example, a covered company would not be able to preference its own apps or those of its subsidiaries arbitrarily or without a clear designation as advertising.”).

well as download third-party app stores if they desire. This would create a massive shift in the current Apple App store by allowing for “sideloading” or the inclusion of third-party apps, whereas Android devices already allow sideloading.<sup>11</sup>

#### LEGISLATIVE DEBATE

As mentioned above, this Act is part of a larger antitrust effort aimed at restricting Big Tech’s dominance over consumers. Senators Blumenthal, Klobuchar, and Blackburn (the original co-sponsors of the bill) argue that the Act will ideally level the playing field for smaller startup tech companies and smaller businesses generally, ensuring a more innovative and competitive app marketplace.<sup>12</sup> Further, they claim it will increase consumer choice while promoting a freer and fairer market. These Senators’ efforts are seemingly a response to mounting complaints from app developers regarding Apple and Google’s fees on in-app purchases and tactics used to discourage installation of apps outside their stores.<sup>13</sup>

Senator Blackburn has specifically described Apple and Google’s actions thus far as “a direct affront to a free and fair marketplace.”<sup>14</sup> Proponents have supported their claims that both tech giants have been using their “gatekeeper control” to stifle competition through testimony provided during a recent Senate Judiciary Hearing by the Subcommittee on Competition Policy,

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<sup>11</sup> *Id.*; Holt, *supra* note 6; Robertson, *supra* note 8.

<sup>12</sup> See *Promoting App Store Competition: Bipartisan Support Grows for the Open App Markets Act*, RICHARD BLUMENTHAL (Nov. 10, 2021), <https://www.blumenthal.senate.gov/newsroom/press/release/promoting-app-store-competition-bipartisan-support-grows-for-the-open-app-markets-act>; *Blumenthal, Blackburn & Klobuchar Introduce Bipartisan Antitrust Legislation to Promote App Store Competition*, *supra* note 3.

<sup>13</sup> Robertson, *supra* note 8; see also *ClearPath: Survey of App Developers*, COAL. FOR APP FAIRNESS, <https://appfairness.org/developer-research/> (last visited Mar. 19, 2022) (finding that nearly 90% of app developers claim there is a need for legislation to prohibit anti-competitive and self-preferencing practices currently used in the app marketplace).

<sup>14</sup> *Blumenthal, Blackburn & Klobuchar Introduce Bipartisan Antitrust Legislation to Promote App Store Competition*, *supra* note 3,

Apple and Google want to prevent developers and consumers from using third-party app stores that would threaten their bottom line. Their anticompetitive conduct is a direct affront to a free and fair marketplace. Senator Blumenthal, Klobuchar, and I are committed to ensuring U.S. consumers and small businesses are not punished by Big Tech dominance.

Antitrust, and Consumer Rights.<sup>15</sup> For instance, it was revealed that startups are particularly challenged by Apple and Google’s ability to disadvantage others’ apps and even block certain developers from using features on their devices. Those supporting the bill believe that creating more accessible opportunities for third parties to have their apps downloaded will consequently result in more choices for consumers at a lower price due to increased competition.<sup>16</sup>

Furthermore, developers would be able to avoid paying fees-per-download, again decreasing costs to consumers, and have the opportunity to “potentially integrate features and use interfaces that may not have been translated across different app ecosystems in the past.”<sup>17</sup>

So far, the bill has been met with overwhelmingly bipartisan support, a rarity in the area of Big Tech regulation.<sup>18</sup> On February 3, 2021, the Senate Judiciary Committee voted to advance the Act in a 20-2 vote with the only two “no” votes coming from republican Senators John Cornyn from Texas and Thom Tillis from North Carolina.<sup>19</sup> On the following day, the Biden administration also signaled its support, stating that it is “supportive of the bipartisan progress being made in Congress” in regard to curbing Big Tech’s control.<sup>20</sup> Despite voicing some concerns and hopes to amend it further, the bill achieved notable support from Senator Mike Lee from Utah who recently voted against similar legislation in January of this year. Further

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<sup>15</sup> *Antitrust Applied: Examining Competition in App Stores Before the Subcomm. on Competition Pol’y, Antitrust, & Consumer Rts. of the Senate Judiciary Comm.*, 117th Cong. (2021), <https://www.judiciary.senate.gov/meetings/antitrust-applied-examining-competition-in-app-stores>.

<sup>16</sup> See Romanoff, *supra* note 5.

<sup>17</sup> *Id.*

<sup>18</sup> See generally *id.*; *Promoting App Store Competition: Bipartisan Support Grows for the Open App Markets Act*, *supra* note 12; Cristiano Lima & Aaron Schaffer, *App Store Clampdown Sails Through Key Vote, Marking Lawmakers’ Latest Antitrust Win*, THE WASH. POST (Feb. 2, 2022, 9:01 AM), <https://www.washingtonpost.com/politics/2022/02/04/app-store-clampdown-sails-through-key-vote-marking-lawmakers-latest-antitrust-win/>.

<sup>19</sup> Lima & Schaffer, *supra* note 18; Lauren Feiner, *Senate Committee Advances Bill Targeting Google and Apple’s App Store Profitability*, CNBC, <https://www.cnbc.com/2022/02/03/senate-committee-advances-open-app-markets-act.html> (Feb. 2, 2022, 12:27 PM).

<sup>20</sup> Leah Nysten & Adam Cancryn, *White House Backs U.S. Tech Antitrust Bills*, POLITICOPRO (Feb. 3, 2022, 7:37 PM), <https://subscriber.politicopro.com/article/2022/02/white-house-backs-tech-antitrust-bills-00005513>.

underscoring its bipartisan nature, the current group of co-sponsors comprises almost an equal split between Democrats and Republicans.<sup>21</sup>

#### SUPPORT FROM WITHIN THE INDUSTRY

It comes as no surprise that many of Apple and Google’s biggest competitors and critics have expressed support as well. The president of Microsoft openly congratulated Senators Blackburn and Blumenthal, claiming that the Act would not only ensure fairness and innovation, but additionally promote competition.<sup>22</sup> The company went as far as announcing new principled best practices for its own Windows App store to signal its commitment to complying with the new laws.<sup>23</sup> Spotify, who has frequently expressed discontent with Apple, additionally weighed in on the matter by applauding the bipartisan leadership that will hold Apple accountable for “their unfair and anti-competitive practices.”<sup>24</sup> Other prominent technology and consumer groups have shown support, including the American Economic Liberties Project, the News Media Alliance, American Principles Project, Internet Accountability Project, Lincoln Network, Consumer Action for a Strong Economy, and more.<sup>25</sup>

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<sup>21</sup> Cong. Rsch. Serv., *Cosponsors: S.2710—117th Congress (2021-2022)*, CONGRESS, <https://www.congress.gov/bill/117th-congress/senate-bill/2710/cosponsors?r=49&s=1> (last visited Mar. 19, 2022). The six republican co-sponsors are Senator Blackburn from Tennessee, Senator Rubio from Florida, Senator Lummis from Wyoming, Senator Graham from South Carolina, Senator Kennedy from Louisiana, and Senator Hawley from Missouri. *Id.* The four democratic co-sponsors are Senator Klobuchar from Minnesota, Senator Booker from New Jersey, Senator Hirono from Hawaii, and Senator Durbin from Illinois. *Id.*

<sup>22</sup> Brad Smith (@BradSmi), TWITTER (Feb. 3, 2022, 6:28 PM), <https://twitter.com/bradsmi/status/1489395484808466438>.

<sup>23</sup> See Brad Smith, *Adapting Ahead of Regulation: A Principled Approach to App Stores*, MICROSOFT BLOGS (Feb. 9, 2022), <https://blogs.microsoft.com/on-the-issues/2022/02/09/open-app-store-principles-activision-blizzard/>.

<sup>24</sup> *What They Are Saying: Tech and Consumer Groups Voice Support for Open App Markets Act*, MARSHA BLACKBURN (Aug. 19, 2021), <https://www.blackburn.senate.gov/2021/8/what-they-are-saying-tech-and-consumer-groups-voice-support-for-open-app-markets-act> (relaying statements regarding the proposed bill made by Spotify’s Head of Global Affairs and Chief Legal Officer); see also Natasha Lomas, *Europe Charges Apple with Antitrust Breach, Citing Spotify App Store Complaint*, TECH CRUNCH (Apr. 30, 2021, 5:58 AM), <https://techcrunch.com/2021/04/30/europe-charges-apple-with-antitrust-breach-citing-spotify-app-store-complaint/>.

<sup>25</sup> See, e.g., *Press Release: Senate Must Pass the Open App Markets Act to Protect American Entrepreneurs and Consumers from Monopoly Power*, AM. ECON. LIBERTIES PROJECT (Feb. 3, 2022), <https://www.economicliberties.us/press-release/senate-must-pass-the-open-app-markets-act-to-protect-american-entrepreneurs-and-consumers-from-monopoly-power/>; Blumenthal, Blackburn & Klobuchar Introduce Bipartisan Antitrust Legislation to Promote App Store Competition, *supra* note 3; 20 Tech CEOs Urge Senate Judiciary

One tech scholar and Senior Fellow at Brookings Institution, Mark MacCarthy, succinctly labelled the current mobile app market as a “concentrated duopoly” given Apple and Google’s nearly fifty-fifty control of the market.<sup>26</sup> He went on to argue that there is a clear need for regulation based on other antitrust authorities experience, in which he cites a Dutch antitrust agency’s threat to impose a weekly penalty on Apple if it fails to adjust the unfair conditions imposed on dating-app providers in the Apple App store.<sup>27</sup>

Some government agencies and developers have already sued Apple or Google, claiming that their current practices violate existing antitrust laws. Epic Games, the publisher of popular video game *Fortnite*, brought an antitrust suit against Apple last year under the Sherman Act and multiple state laws.<sup>28</sup> Many of the allegations against Apple would more clearly be illegal if the Open App Markets Act was passed. For instance, Epic Games challenged Apple’s 30% commission for all in-app purchases, which the presiding federal judge found “nothing anticompetitive” about.<sup>29</sup> While the litigation is currently ongoing due to appeals from both sides, the initial order from the District Court essentially resulted in small wins for both Apple and Epic Games, with neither achieving a decisive victory. Challenges like this one signal a strong desire for change in the field of media computing when it comes to the seemingly unyielding dominion some companies maintain.

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*Committee to Pass Open App Markets Act*, COAL. FOR APP FAIRNESS, <https://appfairness.org/20-tech-ceos-urge-senate-judiciary-committee-to-pass-open-app-markets-act/> (last visited Mar. 20, 2022); *What They Are Saying: Tech and Consumer Groups Voice Support for Open App Markets Act*, *supra* note 24.

<sup>26</sup> Mark MacCarthy, *The Open App Markets Bill Moves Out of the Senate Judiciary Committee*, TECHTANK (Mar. 10, 2022) <https://www.brookings.edu/blog/techtank/2022/03/10/the-open-app-markets-bill-moves-out-of-the-senate-judiciary-committee/>.

<sup>27</sup> *Id.*; see generally Murco Mijnlief, *ACM Obliges Apple to Adjust Unreasonable Conditions for its App Store*, AUTH. FOR CONSUMERS & MKTS. (Dec. 24, 2021), <https://www.acm.nl/en/publications/acm-obliges-apple-adjust-unreasonable-conditions-its-app-store>.

<sup>28</sup> *Epic Games, Inc. v. Apple Inc.*, No. 4:20-CV-05640-YGR, 2021 WL 4128925 (N.D. Cal. Sept. 10, 2021).

<sup>29</sup> *Id.* at \*22; see also Bobby Allyn, *What the Ruling in the Epic Games v. Apple Lawsuit Means for iPhone Users*, NPR (Sept. 10, 2021, 7:15 PM), <https://www.npr.org/2021/09/10/1036043886/apple-fortnite-epic-games-ruling-explained>.

## BIG TECH OPPOSITION

### A. Core Concerns

The Open App Markets Act (the “Act”) has received resounding political support since its introduction, but the affected technology companies have proffered several arguments in opposition. Apple and Google contend that if passed, the Act would undercut their ability to vet apps that are sold on their devices, a measure that serves to protect consumers’ privacy and security.<sup>30</sup> In the current ecosystem, Apple and Google have complete control over which apps may be sold in their app stores. While proponents of the Act view that control as proof that legislation is needed, many statistics signal that consumers in fact benefit from a single source of developers verified within one app store.<sup>31</sup> The companies explain how the Act in its current form is dismissive of this legitimate concern regarding security oversight.<sup>32</sup> As a whole, smartphones have thus far been less susceptible to malware than personal desktop computing, which can be attributed to the way Apple and Google can standardize app stores on their mobile phones.<sup>33</sup> In contrast, on a desktop computer or a laptop, consumers can access innumerable websites and applications and face a wide array of security risks.<sup>34</sup>

Apple and Google further question why the Act exempts gaming platforms from its purview.<sup>35</sup> Procompetitive legislators intend for the Act to provide more choices to consumers, which is a goal of many similar antitrust legislations. With tech companies, legislators are often concerned that consumers are locked into tech companies’ chosen way of using their products.

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<sup>30</sup> Adi Robertson, *Everything you need to know about the bill that could blow up the app store*, THE VERGE (Feb 9, 2022), <https://www.theverge.com/22914479/open-app-markets-act-legislation-senate-committee-markup-explained>.

<sup>31</sup> Mark MacCarthy, *The Open App Markets bill moves out of the Senate Judiciary Committee*, BROOKINGS (Mar. 10, 2022), <https://www.brookings.edu/blog/techtank/2022/03/10/the-open-app-markets-bill-moves-out-of-the-senate-judiciary-committee/>

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Robertson, *supra* note 30.

For example, once a consumer buys an iPhone, the consumer must abide by Apple’s rules in order to continue using the iPhone. The options are binary: either a consumer uses the phone in alignment with Apple’s desires, or the consumer does not use the phone at all. If avoiding that type of power is the underlying philosophy for creating this Act, the exemption of Microsoft’s Xbox console from the Act appears arbitrary.<sup>36</sup> Any device is capable of locking in a consumer, not just smartphones. Microsoft has stated that it will allow developers to access its app store and implement other open system features, in parallel to the goals of the Act, but a public statement is distinct from a governing regulation that can inflict substantial financial damages.<sup>37</sup> Public policy experts have voiced opposition to gaming exemptions and claim that the exemptions allow for Congress to effectively choose winners in a competitive field.<sup>38</sup>

Though not explicitly stated, the Act targets Apple and Google as a response to complaints from iOS and Android app developers regarding fees and being generally disfavored. As a near duopoly, Apple and Google carry the two largest market shares for mobile phones and comprise nearly the whole market.<sup>39</sup> With such large outreach over mobile phone app stores, it may be difficult for Apple and Google to avoid legislation, but the consequences of the Act are not simple and carry the potential to harm consumers.

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Arthur Sidney, *Congress Wants to Regulate Your App Store By Picking Winners and Losers – But They Aren’t Doing It With Your Best Interest in Mind*, DISRUPTIVE COMPETITION PROJECT (Jan. 31, 2022), <https://www.project-disco.org/competition/013122-congress-wants-to-regulate-your-app-store-by-picking-winners-and-losers/>

<sup>39</sup> Statista Research Development, *Market share of mobile operating systems in North America from January 2018 to June 2021*, STATISTA (Mar. 17, 2022), <https://www.statista.com/statistics/1045192/share-of-mobile-operating-systems-in-north-america-by-month/#:~:text=Google's%20Android%20and%20Apple's%20iOS,other%20than%20Android%20or%20iOS> (noting just 0.35 percent of users were running a mobile operating system other than Android or iOS).



## B. Unintended Consequences

As with all legislation aimed at Big Tech, the Act's implications are multifaceted. The Act, among other requirements, dictates that a company with more than 50 million U.S. users cannot unreasonably preference its own apps over third-party apps.<sup>40</sup> That prohibition seemingly aligns with traditional goals against anticompetitive behavior. Amazon, for example, has been similarly criticized for promoting its own products on Amazon over competitors' products.<sup>41</sup> However, in practice, experts worry that this broad standard articulated in the Act could be twisted by extremist content producers.<sup>42</sup> Apps or users of apps that espouse hate speech or misinformation could claim that if an app store removes its content, that company operating the app store is thereby unreasonably preferencing certain content over others.<sup>43</sup> Critics point to Parler as a realistic example in which an extremist content company could utilize this provision of the Act by relying on this non-preferential treatment standard.<sup>44</sup>

The potential issue of how prohibiting any "unreasonable preference" could support extremist content touches on the fundamental question of whether technology companies should be viewed as publishers of content on their platforms. The longstanding principle is that technology companies are not publishers, but if the Act passes, it will put Apple and Google in a position where they will be forced to allow any apps to be downloaded onto their phones, regardless of whether the content is nefarious or harmful to the public.<sup>45</sup> That situation creates a

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<sup>40</sup> Open App Markets Act, *supra* note 1.

<sup>41</sup> Renee Dudley, *Amazon's New Competitive Advantage: Putting Its Own Products First*, PROPUBLICA (June 6, 2020), <https://www.propublica.org/article/amazons-new-competitive-advantage-putting-its-own-products-first>.

<sup>42</sup> Cristiano Lima, *App store clampdown sails through key vote, marking lawmakers' latest antitrust win*, THE WASHINGTON POST (Feb. 4 2022), <https://www.washingtonpost.com/politics/2022/02/04/app-store-clampdown-sails-through-key-vote-marking-lawmakers-latest-antitrust-win/>.

<sup>43</sup> *Id.*

<sup>44</sup> Robertson, *supra* note 30.

<sup>45</sup> Lauren Feiner, *Big Tech's favorite law is under fire*, CNBC (Feb. 19, 2020), <https://www.cnbc.com/2020/02/19/what-is-section-230-and-why-do-some-people-want-to-change-it.html>.

conundrum whereby these companies could be viewed as endorsing certain apps by allowing their presence on the mobile device and could then be faulted for their devices promoting such content. By opening up their products to non-vetted content, Apple and Google may face reputational damage and loss of consumer confidence in their products.

#### DEVELOPERS' DISCONTENT VS. CONSUMERS' WANTS

The Act addresses a perceived abuse of power by both Apple and Google in the current app store environment, but the question lingers as to whether consumers will actually benefit from a structural change. The companies reason that a determination as to whether the Act is prudent should ultimately turn on whether the new regulations will benefit consumers. Specifically, the question is if the Act is passed, whether consumers will receive a wider selection of apps or higher quality apps on the Apple App Store and Google Play Store. That result is debatable. As of 2021, consumers have access to 3.48 million apps on the Google Play Store and 2.22 million apps on the Apple App Store.<sup>46</sup> If the floodgates are opened, it is certainly possible and in fact more than likely that the absolute quantity of available apps would increase. However, the field for apps is already extremely competitive and produces winners based on rigorous competition.<sup>47</sup> Apple does not handpick Angry Birds as the best app on the App Store and then tell consumers to download that app and play Angry Birds for hours. Consumers pick apps that appeal to them and decide whether or not they provide value. The current system reflects how consumers choose from a wide array of apps and judge for themselves which have desirable qualities and features.

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<sup>46</sup> L. Ceci, *Number of apps available in leading app stores as of 1st quarter 2021*, STATISTA (Jan. 27, 2022), <https://www.statista.com/statistics/276623/number-of-apps-available-in-leading-app-stores/#:~:text=As%20of%20the%20first%20quarter,million%20available%20apps%20for%20iOS.>

<sup>47</sup> Daria Dubrova, *5 Things That Make Mobile Apps Popular*, THE APP SOLUTIONS, (<https://theappsolutions.com/blog/marketing/make-apps-popular/>).

Apple has voiced a concern that by allowing consumers to sideload apps and use alternative app stores, developers would be able to bypass Apple's privacy and security safeguards.<sup>48</sup> Consumers have never experienced this type of open structure for app stores, as they have only used or purchased apps exclusively on the Apple app store or Google Play store. Since consumers can hardly fathom how they would benefit from something that has never existed, it stretches credulity to argue that consumers are demanding a new app store system. In that case, the Act is driven almost entirely by developers' discontent with Apple and Google.

Moreover, it does not appear that consumers, as a whole, are unhappy with the current availability of apps on these app stores. There is no conceivable comparison for a different version of their app store experience. If consumers can access alternative app stores to choose from and find different developers, there is no guarantee that this would be a preferable experience to the current one. Developers would certainly benefit because many restrictions would be lifted, thereby allowing developers to pay less fees and earn greater profits. But, as technology companies continually point out, technology should ultimately be judged on the consumer experience it provides.

Consumers generally do not want their data tracked without their knowledge. When consumers use an iPhone, they know that Apple has access to swathes of their personal data. The fact that your iPhone contains an enormous amount of personal information has become common sense for even the most uninformed consumer. However, if such a consumer started downloading apps on their iPhone from different app stores or locations, that consumer may think that his security on the iPhone has remained the same. Apple's concern is that consumers

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<sup>48</sup> Diane Bartz, *Apple presses U.S. lawmakers on dangers of 'sideloading' apps allowed by bill*, REUTERS (Mar. 4, 2022), <https://www.reuters.com/technology/apple-presses-us-lawmakers-dangers-sideloading-apps-allowed-by-bill-2022-03-04/#:~:text=Congress%20is%20currently%20considering%20a,order%20to%20keep%20users%20safe>.

will bear the negative consequences, as they unknowingly share even more personal information across the web in exchange for an experience that may ultimately be no better than the current app store experience.

The Act should reflect a balance, in which Apple and Google deserve to maintain their good reputational name while also being implored to loosen some restrictions on developers, namely fees. If the iPhone becomes ripe with malware and consumers begin downloading apps from places they mistakenly thought were secure, the iPhone and Apple will be blamed. Having such wide autonomy will require consumers to be more vigilant in the way they use their iPhones and Androids and undeniably takes away some of Apple's and Google's oversight capabilities.

#### RACE FOR HARDWARE

Underlying much of the discourse between Apple, Google, Facebook, Amazon, and Microsoft is a continuous Silicon Valley rivalry. When technology companies provide their input on current legislation that does not apply to their business practices, that input must be received with some suspicion. For example, we must analyze whether Microsoft really believes that the Act is prudent and urgent for consumers or whether Microsoft is merely eager to see a competitor adapt to a challenging new legal regime for its most profitable product, for which Microsoft offers no substitute.<sup>49</sup> In order to understand the current duopoly in the smartphone market, it is informative to look at the hardware race in Silicon Valley that resulted in Apple and Google as the perennial winners for mobile devices.

In the 21<sup>st</sup> century, many technology companies attempted to build a mobile device equipped with a high-powered operating system. Facebook's HTC phone, Amazon's Fire Phone,

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<sup>49</sup> Jordan Novet, *Bill Gates says letting Android win mobile was his 'biggest mistake' at Microsoft*, CNBC (Oct. 15, 2020), <https://www.cnbc.com/2019/06/24/bill-gates-why-microsoft-missed-mobile-and-let-android-get-ahead.html> (noting Microsoft made a mistake by not becoming a dominant mobile operating system).

and Microsoft's Windows Phone all failed to gain traction with consumers and ultimately shut down production.<sup>50</sup> It became clear that the leap to mobile phones was the future, and Apple and Google ultimately captured this profitable market.<sup>51</sup> As of 2021, 85% of Americans now own a smartphone.<sup>52</sup> Legislation has subsequently been levied at Apple and Google for their smartphones just as Amazon and Microsoft faced their own hurdles for different anticompetitive practices over the decades. Against this context, proponents of the Act should recognize that competing tech leaders have a vested interest in seeing Apple and Google face higher restrictions in the mobile hardware space and that their opinions must be parsed from those benefits they would reap.

#### CONCLUSION

The dynamic digital economy has infiltrated almost all aspects of society, gaining increased reliance by consumers in their daily lives. With a specific focus on the mobile app ecosystem, the Open App Markets Act was introduced to promote competitive practices and restrict the seemingly overly powerful dominance of certain Big Tech companies. Despite receiving overwhelmingly bipartisan support, the Act has incited some contentious discussions. While proponents assert that it is necessary to end the current duopoly that Apple and Google maintain over the market, opponents have expressed concern regarding the unintended consequences of mandating non-preferential treatment and question the purported benefits to consumers. Although the opposition raises some legitimate apprehensions, the pro-consumer

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<sup>50</sup> Devon Taylor, *13 "Revolutionary" Cell Phones That Failed Miserably*, GOLIATH, <https://www.goliath.com/tech/13-revolutionary-cell-phones-that-failed-miserably/>.

<sup>51</sup> Statista Research Development, *supra* note 39.

<sup>52</sup> *Mobile Fact Sheet*, PEW RESEARCH CENTER (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/mobile/>.

implications and persistent app developer complaints have led to an emerging consensus that the Act's perceived benefits outweigh its potential drawbacks.